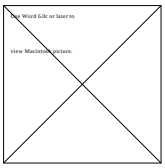

Order 97-3-42
Posted: March 28, 1997
Served: April 3, 1997

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 28th day of March, 1997

Joint Application of

AMERICAN AIRLINES, INC

and

BRITISH AIRWAYS PLC

under 49 U.S.C. Sections 41308 and 41309 for approval of and antitrust immunity for alliance agreement

Docket OST-97-2058

ORDER

On January 10, 1997, American Airlines, Inc. ("American") and British Airways PLC ("BA") (together "the Joint Applicants") filed in Docket OST-97-2058 an application for approval of and antitrust immunity for an alliance agreement under sections 41308 and 41309 of Title 49 of the United States Code. The Joint Applicants also filed a motion under Rule 39 of the Department's procedural regulations, 14 C.F.R. 302.39, for confidential treatment of documents submitted in support of that application.[1]

In Order 97-3-34, issued March 21, 1997, we indicated our intention to move forward with this proceeding. By this order, the Department grants limited

[1] American and BA also filed applications in Dockets OST-97-2054, 2055, 2056, and 2057 for exemption and certificate/permit authority between the United States and the United Kingdom and beyond to numerous third countries, and an undocketed joint application for statements of authorization to code-share between those points.

interim access to certain information filed by the Joint Applicants in Docket OST-97-2058 for which they have requested confidential treatment, and directs the Joint Applicants to file an index (a “Vaughn” index) describing and justifying all documents withheld by the applicants for *in camera* inspection to determine relevance.

In taking these actions, the Department is making no determination that the application in Docket OST-97-2058 is substantially complete within the scope of 14 C.F.R. 303, Subpart E, and we are not at this time establishing procedures or procedural dates for the processing of the applications. Appropriate procedures and procedural dates will be established by subsequent order.

As noted, the Joint Applicants filed a motion under Rule 39 of the Department's procedural regulations, 14 C.F.R. 302.39, for confidential treatment of numerous documents submitted in support of the application.[2] The Joint Applicants assert that the information contained in the documents is proprietary, commercially sensitive, and confidential in nature, and therefore qualifies for being withheld from public disclosure. Consistent with well-established Department precedent, however, the Joint Applicants accept that limited access to the documents may be granted under an affidavit procedure pending a Department ruling on the confidentiality issue. In addition, as part of their motion, the Joint Applicants indicated that they have withheld, or provided redacted versions of, certain documents containing "extraordinarily sensitive" commercial information, which they would make available to DOT staff for review on an *in camera* basis to allow the Department to determine the relevance of such information to the proceeding. The motion did not identify the referenced documents, but by letter dated January 10, 1997, counsel for American Airlines provided the Department's Office of Aviation Analysis with a list of 58 documents all or partially withheld for *in camera* inspection.[3]

Two answers have been filed in partial opposition to the Rule 39 motion, neither of which takes a position on the ultimate question of confidentiality. ALPA objects to the Joint Applicants' request that interim access to the documents submitted with the Rule 39 motion should be limited to counsel and "outside experts" for interested parties who sign confidentiality affidavits. ALPA contends that its own "in-house" experts should also be allowed such access, on the grounds that retaining outside experts would be an unwarranted expense and inconvenience, that ALPA is not an airline "competitor" of the Joint Applicants with the attendant risk that confidential material could seep into

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[2] Such documents were submitted in response to a preliminary DOT staff information request set forth in a letter to counsel for American and BA dated November 26, 1996. This letter has been placed in Docket OST-97-2058.

[3] This list has been placed in Docket OST-97-2058 as a necessary part of the Rule 39 motion.

harmful marketplace decision-making, and that ALPA's in-house experts have scrupulously adhered to Rule 39 confidentiality commitments in other cases. The Joint Applicants respond that, while ALPA itself may not be a "competitor," it does represent employees of several airlines that are direct competitors and that strongly oppose the proposed alliance, thus posing an additional risk of inadvertent disclosure of the highly sensitive documents.

We will adhere to our practice, reflected in recent alliance cases such as *Delta-Swissair/Sabena/Austrian*, of limiting interim access to counsel and outside experts who file Rule 39 affidavits. In *Delta,* we rejected a similar request by ALPA, finding that the risk of undue competitive harm to the joint applicants outweighed the need for expanded access, particularly since either inside or outside counsel can participate.[4]

USAir objected to the Joint Applicants' request for *in camera* review of certain withheld documents unless and until they file a "Vaughn index identifying each document for which *in camera* review is sought by title, date, identity of authority and recipient(s), and a brief description of each such document." The Joint Applicants argue that no such requirement has been imposed on any of the other applicants for alliance antitrust immunity, and that the Department's consistent practice has been to review *in camera* documents on an *ex parte* basis, without the prior submission of a Vaughn index to opposing parties. The Joint Applicants contend that even a description of some of the highly sensitive documents in an index would itself cause competitive and commercial harm to the applicants.

The Joint Applicants are mistaken in both respects. The Department has indeed found it necessary and appropriate to require the filing of a detailed index of withheld documents in recent alliance cases; moreover, its current practice is that the index belongs in the public docket. In Docket OST-95-792, we found that the alliance applicants, American and Canadian Airlines International, had not described the materials withheld from the record sufficiently to permit us to establish their relevance to the issues in the proceeding, and we therefore directed them to provide comprehensive descriptions of the data and information contained in those documents as a supplement to their application.[5] In so doing, we referred to our "advisory review standard" referenced in the *Delta* alliance proceeding, in which a similar problem had arisen.[6] In the *American-CAI* proceeding, we were able to make determinations of relevance in

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[4] Order 95-11-5, issued November 3, 1995, at 5, *citing* Joint Application of United and Lufthansa, Order 93-12-32, served December 22, 1993, at 5 (code-sharing case).

[5] *See* Order 95-11-18, issued November 13, 1995.

[6] Order 95-11-5.

most cases from the index itself, which we required to be filed in the docket and served upon interested parties.[7]

Based on our initial review of the withheld document list provided by the Joint Applicants, we find that the list does not describe the materials considered privileged with the specificity or completeness necessary for us to establish their relevance to our evaluation of the application. Reflecting the criteria articulated in Order 95-11-18, it is our policy to require applicants to (1) identify fully each redacted or withheld document; (2) supply a complete description of the nature of each document and withheld portion; (3) provide a specific basis for the applicants' view as to the privilege and lack of relevance of each document or withheld portion; and (4) explain for each document or withheld portion why our confidential procedures are insufficient to protect the applicants' competitive and commercial interests. The identification requirement includes the identity of the drafter(s) and the intended recipient(s). We are not persuaded by the Joint Applicants' general assertion that such detail would result in competitive harm if the documents are not relevant to the proceeding, a risk which is in any event outweighed by policies disfavoring *ex parte* decision-making. We therefore direct the Joint Applicants to file information in the docket, with appropriate service, which meets the foregoing requirements. While we will set no specific deadline, we note that it would be difficult to rule on whether the alliance application is substantially complete until determinations can be made on the relevance of the withheld documents, which presumably fall within the scope of the DOT staff's initial information request. Consistent with our action in the *American-CAI* proceeding, the parties will have seven business days from the filing of the Vaughn index to file comments on the Joint Applicants' motion for confidentiality.[8]

In the meantime, to afford interested parties prompt access to the majority of the documents under conditions agreed to by the Joint Applicants and imposed by the Department under similar recent circumstances,[9] we will grant immediate interim access to all documents covered by the Rule 39 Motion, except those for which *in camera* examination has been requested, by counsel and outside experts

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[7] Order 95-11-18, ordering paragraph 2. *See also* American-TACA, Order 97-3-17, issued March 13, 1997 (reciprocal code-sharing arrangements).

[8] Following the filing of the index, we will follow the procedure outlined in Orders 95-11-5 and 96-1-6: if we find that review of some of the material *in camera* is appropriate, we will review it. If we find that any of the information is relevant to our decision in the proceeding, we will require that the information be filed in the record. Conversely, if we initially determine that the reviewed materials are not relevant to our decision, we will not require that the materials be filed in the docket, while reserving our right subsequently to decide, at any time, that the previously reviewed information is significant and relevant, and therefore must be placed in the docket. The applicants could then seek confidential treatment of such material under Rule 39.

[9] See notices in Docket 49223 dated November 10 and November 24, 1993.

for interested parties who file appropriate affidavits with the Department in advance. (We will rule on the merits of the motion for confidential treatment in a later order or notice.)

We expect all affidavits to state, at a minimum, that (1) the affiant is counsel for an interested party or an independent expert providing services to such a party; (2) the affiant will use the information only for the purpose of participating in this proceeding; and (3) the affiant will disclose such information only to other persons who have filed a valid affidavit. Affiants and interested parties must understand and agree that any pleading or other filing that includes or discusses information contained in the covered documents must itself be accompanied by a Rule 39 motion requesting confidential treatment. Affidavits must be filed in this docket in the Department of Transportation Dockets, Room PL 401, 400 Seventh Street, SW, Washington, D.C., 20590.

Affiants having filed valid affidavits may examine the documents at the Department of Transportation Dockets location, and, in addition, at the following locations provided by the Joint Applicants in Washington, D.C.: (1) Sullivan & Cromwell, counsel for British Airways, 1701 Pennsylvania Ave. NW, 7th Floor, Washington, D.C. 20006; contact: Jeffrey W. Jacobs, (202) 956-7510. (2) Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, NW, Suite 600, Washington, D.C. 20036, (202) 496-5647. A stamped copy of the affidavit filed with the Department of Transportation must be presented prior to examination.

Further procedures, including deadlines for answers or other filings, will be determined in a subsequent order or notice.

ACCORDINGLY,

1. We grant interested parties access to the confidential materials in this docket in accordance with the terms of this order;

2. We direct American Airlines, Inc. and British Airways PLC to provide the detailed descriptions set forth in this order, as a supplement to their motion for confidential/*in camera* treatment; and

3. Upon submission by the applicants of the required descriptions in this docket, interested parties will have seven business days to file comments on the applicants' motion for confidential treatment.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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